72-430

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SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-430

GLADYS C. DOSS, Petitioner

v.

LEWIS-GALE HOSPITAL, INC., Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE CITY OF ROANOKE, VIRGINIA

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SUPREME COURT OF THE UNITED STATES

October Term 1972

No. _____

GLADYS C. DOSS, Petitioner

v.

LEWIS-GALE HOSPITAL, INC., Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE CITY OF ROANOKE, VA.

Petitioner, Gladys C. Doss, respectfully prays that a writ of certiorari issue to review the judgment of October 21, 1971 of the Circuit Court for the City of Roanoke, Virginia overruling Petitioner's motions for a new trial and entering judgment in favor of Respondent. The Supreme Court of Virginia, by order entered on June 16, 1972, rejected Petitioner's petition for a writ of error, thus affirming the judgment of October 16, 1971.

OPINION BELOW

The Trial Court gave no written opinion. Its order of October 21, 1971, overruling Petitioner's motions for a new trial and entering judgment on the verdict appears in the appendix hereto.

The opinion or order entered on June 16, 1972 by the Supreme Court of Virginia, refusing Petitioner a writ of error, is reported in 213 Virginia, and appears in the appendix hereto.

GROUNDS INVOKING THE JURISDICTION OF THIS COURT

1. The date of the Order of the Supreme Court of Virginia which denied Petitioner a writ of error and thus affirmed the judgment of October 21, 1971, of the Circuit Court for the City of Roanoke, Virginia, which Court was the highest Court in the State which ruled on the merits of the case, was June 16, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether Petitioner was denied the fair trial guaranteed her by the due process and equal protection of the laws provisions of the Fourteenth Amendment to the Constitution of the United States by action of the Trial Judge in informing her counsel, only after the trial was underway, that he had made some personal social plans for Friday, October 15, 1971, and would thus not be available on that day, although for four months this case had been set for trial during the four days from Tuesday, October 12 through Friday, October 15.

STATUTORY PROVISIONS

Section 8-225.1 of the Code of Virginia, as amended in 1970, provides in

part as follows:

"____ and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or an appeal."

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Suit was brought by Petitioner against Respondent in the amount of 1.3 million dollars for personal injuries, including loss of Petitioner's left leg by below the knee amputation, alleged to have resulted from the negligence of Respondent's nurse employee in administering an injection of Phenergan into Petitioner's left buttock on April 25, 1968, while Petitioner was a patient in the hospital operated by Respondent.

Petitioner's trial was originally scheduled for three days in June 1971, but the Trial Judge found that he needed some of the time for other matters, so the case was rescheduled and redocketed for October 12, 13, 14, and 15, 1971, counsel for Petitioner having advised the Court that four days would be required for the trial since two more doctors had become involved as witnesses for Petitioner since the time the case had originally

been set for trial. The four days in October assigned to this case was the earliest block of four consecutive week days available on the Trial Judge's calendar. At all times from June 1971, until October 12, 1971, when the trial commenced, counsel for Petitioner planned for a four day trial and counted on having full use of the four scheduled consecutive days for trial of this important and complicated case, involving difficult and sophisticated medical issues and extensive testimony of expert medical witnesses.

On the morning of October 12, 1971, after opening statements had been made and the trial had gotten underway, the Trial Judge approached counsel for Petitioner during a recess and informed them that he had accepted an invitation to attend a social function in Richmond, Virginia on Friday, October 15th, and that he was going to attend. He went on to tell counsel that they need not feel they must rush the presentation of their case since, if the case was not completed by Thursday he would allow the jury to come back on Monday to finish it. This was the first and only notification to counsel for Petitioner that they would not have available to them for the trial of this important case the four consecutive days they needed and had been counting on having for the four months since the case had been rescheduled.

Counsel for Petitioner knew it would be calamitous to the Petitioner for the jury to be dispersed for a three day weekend. Their personal activities would inevitably distract them from consideration of the issues of the case and they would inevitably forget much of what they had heard in three days of

trial, particularly the testimony of Petitioner's expert medical witnesses which they would have heard first. Counsel for Petitioner thus resolved to try, at virtually any cost, to avoid the dispersal of the jury, even if it meant drastically curtailing or even waiving closing arguments in the case, as vitally important as these arguments were recognized to be. As it developed, in order to get the case to the jury on Friday morning, October 15th, while the Trial Judge was still available, counsel for Petitioner agreed to limit their closing arguments to 40 minutes per side. This drastically curtailed time for closing argument operated to the extreme prejudice of Petitioner. Counsel for Petitioner had grossly insufficient time to discuss the liability aspects of the case in their closing arguments and virtually no time to devote to the damage aspects.

The jury returned a verdict for Respondent.

On October 21, 1971, counsel for Petitioner made several motions for a new trial and argued same to the extent permitted to do so by the Trial Judge. These motions were overruled, by Order entered that date, granting judgment in favor of Respondent, in conformity with the jury's verdict, and it is this order which Petitioner asks this Court to review. Petitioner made timely application to the Supreme Court of Virginia for a Writ of Error, which was denied by Order entered on June 16, 1972. Since the Supreme Court of Virginia declined to exercise its discretionary appellate jurisdiction, the Circuit Court for the City of Roanoke, Virginia is the highest Court inthe State to consider this case

on its merits.

HOW THE FEDERAL QUESTIONS WERE RAISED

The federal questions presented in the petition were raised on October 21, 1971, in Petitioner's motions for a new trial. Petitioner was prepared to assert that the Trial Judge's surprise deprivation of Petitioner's fourth scheduled day for the trial deprived her of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States. The Trial Judge, at the time of the making and arguing of Petitioner's motions for a new trial, repeatedly refused to allow counsel for Petitioner to state any law in support of said motions. (Transcript of Motion for New Trial, 5,6,7,21, and 22) Counsel for Petitioner was prepared at this time to make full reference to the ways in which Petitioner's Fourteenth Amendment rights to due process and equal protection of the law were violated by actions of the Trial Judge. These federal questions were fully stated in Petitioner's petition for appeal and writ of error which was timely filed with the Supreme Court of Virginia, principally in point 5 thereof. The Supreme Court of Virginia, by denying Petitioner's petition for appeal and refusing her a writ of error, declined to review these federal questions on the merits.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

1. Certiorari should be granted to determine whether the Trial Judge's action in taking away Petitioner's fourth scheduled trial day for his

personal use, without any advance notice to her counsel, was so capricious, arbitrary and prejudicial as to have deprived Petitioner of her right to due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Counsel for Petitioner knew that four consecutive days would be needed for this Trial and so advised the Trial Judge when this case was being rescheduled in June, 1971. The Trial Judge set apart for this case October 12, 13, 14, and 15, 1971, the first block of four consecutive week days available. Counsel for Petitioner would never have consented to let the case be set as a split trial, starting one week and ending the next, separated by a weekend. Petitioner was entitled to have a jury consider her case from start to finish without the distractions of an intervening weekend. If the Trial Judge was not willing to devote four consecutive days to presiding over this trial, he should have refused to set them apart on his calendar. Once he set them apart, Petitioner and her counsel were entitled to rely on having the full use of those four days, or as much thereof as should be needed.

Apparently, the Trial Judge felt that he could make other plans for the fourth scheduled day of the Trial, without giving Petitioner or her counsel any notice whatsoever of this major change in the trial schedule. Common courtesy would have compelled advance notification of his changed plans. Due process of law clearly required advance notification at the very least.

After the case was in progress, the Trial Judge approached counsel for the Petitioner during a recess and

advised them he had accepted an invitation to attend the Tobacco Bowl Festival in Richmond, Virginia on Friday, (the fourth scheduled day of the trial) and that he was going to attend. He said that counsel for the Petitioner should not feel they had to hurry their case since, if it were not completed by Thursday, he would let the jury come back on Monday and finish it. He apparently was satisfied that he had a right to break his commitment, made several months earlier, to preside over this trial from Tuesday through Friday. He knew or surely should have known that it would be highly damaging to Petitioner to either have to speed up the case or have it broken by a long weekend. However, he was willing to sacrifice for his personal social convenience Petitioner's right to have her case presented in an orderly and unhurried manner. Once the Trial Judge set the four consecutive days apart for the trial of Petitioner's case, she had a property right in this that the Trial Judge did not have the right to take from her without due process of law. If he had notified her counsel before the trial that he was not going to be available for the fourth day, they could have considered whether to ask for a continuance or for a different judge to hear the case. They might have been able to prevent Petitioner's medical witnesses from coming and thus save Petitioner some trial attendance fees and travel expenses. By giving no notice of his broken commitment with respect to the fourth day, until the trial was under way and Petitioner's out of state expert medical witnesses were already in Roanoke or enroute, the Trial Judge surely deprived her of property (her right to the

four scheduled consecutive days of trial, her reasonable expectations of recovery of a substantial judgment in the trial, and the attendance fees and travel expenses of her medical witnesses) without due process of law.

As important as her claim, and her right to a fair hearing of it, is to Petitioner, the issues involved here far transcend her individual rights and interests.

Our judicial system necessarily relies heavily on trial judges to be vigilant to see that all litigants receive fair trials. To the extent they fail in this responsibility, respect for the law is eroded. By granting this Petition, this Court will serve notice that when Constitutional guarantees of due process and equal protection of the laws are usurped and violated by a trial judge, this Court will intervene. Trial judges must be reminded that despite their awesome power, they will not be permitted by this Court to deprive any litigant of a fair trial by arbitrary and capricious action.

The fundamental issue here involved is whether the State of Virginia, through the actions of one of its judges, deprived Petitioner of her Constitutionally guaranteed right to due process and equal protection of the laws. If so, it is clearly the province and duty of this Court, the highest State Court declining to act, to make good Petitioner's guarantee, by setting aside the verdict resulting from the unfair trial and granting her a new trial. By granting this Petition, this Court will reassure citizens of this country that their Constitutional rights cannot be violated with impunity by trial judges who depart from their sworn

duty to uphold these rights.

It would be impossible to exaggerate the devastating effect on Petitioner's cause of the Trial Judge's amazing and disheartening announcement, after the trial was under way and Petitioner's three expert medical witnesses were either on hand or enroute, that he had made himself unavailable for the fourth scheduled day of the trial so that he could attend a social function. So far as Petitioner and her counsel were concerned, the whole complexion of the trial changed instantaneously from one in which they felt prepared to adequately present their case and confident they had an excellent chance of winning it, to one in which it was apparent that they would have to be fighting against the Trial Judge as well as opposing counsel. It was crushingly unfair to Petitioner and violative of her basic right to have her case presented in an orderly and unhurried manner, for the Trial Judge to have made known his unwillingness to adhere to the four consecutive days he had set apart for this trial the way he made it known. The Trial Judge and counsel for Respondent have questioned Petitioner's standing to object to this action on his part since they did not object at the time the announcement was made. Petitioner submits that it was unnecessary and grossly unfair for the Trial Judge to have confronted counsel for Petitioner with this disheartening announcement under circumstances where there was no response to this development that would not have been extremely detrimental to the Petitioner. Counsel for Petitioner were confronted by a sudden emergency not of their own making. If they had insisted on this being put on the record and if they had objected to

the Trial Judge's announced change of plans, he would surely have been resentful toward them for opposing his personal desires in the matter, to the obvious detriment of Petitioner. Asking for the case to be continued or tried by another Judge, in the light of the Trial Judge's unwillingness to devote the scheduled four days to it, was not a practical possibility. Counsel for Petitioner had been working on preparations for the case for over a year. Very substantial expenses had been incurred in doing the necessary medical research and in obtaining competent medical witnesses, and in taking of extensive pretrial depositions. Petitioner's expert medical witnesses were on hand or enroute and would have to be paid substantial sums for their time and attendance, so that counsel for Petitioner were virtually compelled to go ahead with the trial and salvage what they could. Their medical witnesses were prepared to testify and certainly could have been expected to lose interest in and enthusiasm for the case if they had been told their testimony would not be needed at this time and they would have to come back later, all to the serious detriment of the Petitioner's cause.

From this moment, the trial of this case was converted into a desperate salvage operation for counsel for Petitioner.

Petitioner submits that the Trial Judge's action in announcing his nonavailability on the fourth scheduled day of the trial was so unexpected and confronted counsel for Petitioner with such a sudden emergency, ordinary considerations concerning the need for objecting to improper actions during trial should not apply. Objections or protests to an action of a trial judge on the grounds

of his unfairness should be viewed in a different light from objections to a trial judge invoking his protection against the alleged misconduct of others. The risk of worsening the client's position is obvious when it comes to accusing the Judge of being unfair himself. Requirements for prompt objection should be relaxed where, as in this case, the Trial Judge has revealed himself as partisan rather than impartial.

Section 8-225.1 of the Code of Virginia provides in part as follows:

" and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or an appeal."

Counsel for Petitioner, as a practical matter, had no opportunity to object to the Trial Judge's announcement that he had decided to use the fourth scheduled day of this trial for his social purposes. Any such objection would almost surely have increased the irritation the Trial Judge exhibited toward counsel for Petitioner before the trial even started, when the Trial Judge stated that he was not going to make a career out of this case and that it might not be as long a trial as counsel for Petitioner thought it would be. (Transcript of Motion for New Trial T 21,22)

It is basic in our law that every litigant is entitled to his day in Court and that depending on the complexities of the case, that day in Court may constitute a number of days. Petitioner contends that a trial which is unduly hurried or unnecessarily disrupted or interrupted is not a fair trial.

Counsel for Petitioner does not know

of any satisfactory way to have responded to such an unprecedented and unexpected development, which abruptly changed the whole climate and atmosphere of this trial from one in which they felt confident and prepared for trial to a climate of surprise, shock, rush, bitterness, and anxiety.

The fact that the Trial Judge acted as he did with respect to the fourth scheduled day for the trial raises grave doubts that Petitioner could have received a fair trial with him presiding. He had obviously prejudged her case as not being worthy of his keeping his commitment for the four days.

The climate of rush which the Trial Judge's taking of the fourth day imposed on Petitioner worked invidiously against her interests and prevented her from having a fair trial. If the fourth scheduled day of the trial had remained available, as it should have, counsel for Petitioner would have never agreed to such a pitifully short time as forty minutes for making their closing arguments on the important and complicated issues of this case. Counsel for Petitioner may not have exercised sound judgment in determining that they must, to avoid dispersal of the jury, curtail the closing arguments as much as need be, but it was the best they could come up with under the circumstances, and it was forced on them by the Trial Judge's shocking announcement. Having received no advance notice of this extreme change in the trial schedule, counsel for Petitioner were confronted by a sudden emergency and should not be judged too harshly as to whether they made the best or even a good response to such an emergency. Petitioner submits that the agreement to limit

closing arguments to forty minutes per side was a coerced agreement, coerced by the climate of rush created by the Trial Judge's surprise decision and delayed announcement, and this agreement should not be considered as any evidence that Petitioner's trial was not unduly rushed.

Counsel for Petitioner were well aware that the closing arguments would be extremely important in this case. Petitioner was a young woman, just thirty-eight years old at the time she received the complained-of injection. She had lost her left leg. She had suffered excruciating pain during the course of the development of a blood clot which manifested itself nine days after the complained-of injection, and during and after the several amputations and scraping operations she had to endure. Appellant had already suffered from extremely poor health and considerable emotional instability even when she was full bodied, as a result of which she was adjudicated totally disabled by the Social Security Administration some five years earlier. Already a person pretty heavily beaten down by life, she now had to adjust to the permanent disfigurement, greatly increased dependence on others, and all the adverse effects this had on her emotionally and psychologically, as well as physically. Counsel for Petitioner were well aware that an important part of their task in adequately representing their client was to help the jury understand the enormity of these losses and damages as they affected this particular person. Counsel for Petitioner knew it would take them two or three hours to deal adequately and effectively with the difficult issues of liability and damages in their closing arguments. However, they believed it was

imperative to avoid the imminent dispersal of the jury, if at all possible, even though this would require sacrifice of time needed for closing arguments.

The forty minutes actually available for Petitioner's closing arguments proved woefully inadequate for a fair and proper summation on behalf of Petitioner. The sense of rush that had pervaded the trial came to agonizing climax at this point. It was a harrowing experience for counsel for Petitioner to know that only a small fraction of the time needed was available, to know that much more needed to be said about the liability issues, that much of what counsel for Respondent had stated in closing argument needed to be challenged and refuted, and to also know that the question of damages in this major personal injury case, with its grave lifelong repercussions to Petitioner, deserved full and unhurried discussion and review, and that it would be most detrimental to Petitioner's cause for this important aspect of the case to be slighted. As it turned out, there was not time for a meaningful discussion of the damages aspect of this case. Counsel for Petitioner contends that this drastic limitation of time for closing arguments was forced on them as a direct result of the Trial Judge's action in depriving them of the fourth consecutive day of trial. They should not have been put into the Scylla and Charybdis choice of either letting Petitioner's trial be interrupted by a long weekend or having to rush it to the jury early enough on the fourth scheduled day of trial so the Trial Judge could submit the case to the jury before departing for his social affair.

The likelihood that any objections counsel for Petitioner might have made to

the Trial Judge's announcement about his unavailability for the fourth day of trial would have served only to increase his irritation with counsel for Petitioner is borne out by the Trial Judge's admission of resentment toward counsel for Petitioner for having moved for a new trial on this ground. (Transcript of Motion for New Trial - 22, 34)

Also, the Trial Judge's bias in favor of Respondent surfaced strikingly during the argument of one of Petitioner's major motions for a new trial. This motion was based on the alleged misconduct of counsel for Respondent in exhibiting to the jury during the course of his opening statement a hypodermic syringe and needle, which he advised them was not the same needle used in administering the complained-of injection but was the same type of needle and was a one inch needle. No objection was made to this demonstration or statement at the time of its occurrence since counsel for Petitioner believed that counsel for Respondent would not make such a representation to the jury, namely that a one inch needle was used in administering the complained-of injection, unless he was prepared to present evidence to that effect. When counsel for the Respondent failed to introduce any such evidence, counsel for Petitioner thought it was due to an oversight. It was only upon reflection after the trial was over that counsel for Petitioner realized that counsel for Respondent must have deliberately sought in this manner to improperly influence the jury into thinking that a one inch needle was used in the complained-of injection. This awareness came from reflection on testimony by the nurse who administered the injection that she did not remember a single thing about

this particular injection to set it apart from any of the thousands of other injections she had given during the course of her nursing career. It was thus impossible for counsel for Respondent to have presented evidence to the jury in support of his highly improper suggestion to them that a one inch needle was employed. This misrepresentation was highly detrimental and prejudicial to the Petitioner. One or more of the jurors could have made up their minds during the opening statement that Petitioner could not have lost her leg as a result of the improper insertion of a needle as short and insignificant as a one inch needle. The testimony of medical witnesses was permeated with reference to one inch needles. This was an issue which counsel for Petitioner raised by means of a motion for a new trial. The Trial Judge, in the summary manner he disposed of this motion, further demonstrated his unwillingness to afford Petitioner a fair trial at every stage of the case.

When counsel for Petitioner made and argued their motion for a new trial based on the unfairness and impropriety of counsel for Respondent's opening statement use of and reference to a one inch needle, the Trial Judge actively championed the position of counsel for Respondent. (Transcript of Motion for New Trial 39, 40, 41) Counsel for Respondent, invited by the Trial Judge to respond to the argument, made the following remarkable statement: "I was not embarrassed by my failure to put the injection or whatever it was into evidence because I have been known, many more times than once to have made rash opening statements which were not supported by the evidence. If I did, and if I did it in this instance,

I assure counsel that this will not be the last time." (Transcript of Motion for New Trial 34, 35) Counsel for Respondent went on to make the following statement, in which he put himself in the strange position of insisting he overlooked putting into evidence that which he could never have put into evidence: "Now in this particular case, when I made reference to the hypodermic syringe it was an effort on my part to try to educate the jury as to the medical facets of the case. At the time, I am quite honest in thinking that I did intend to put the needle into evidence. Frankly, I overlooked it - - - I would rather you used that word than forgot."

"It wasn't of enough significance for me to worry about it, and that is the main reason that it didn't get into the evidence. But at anytime plantiff's counsel could have put the hypodermic needle into evidence, if they wanted to, because it stayed on my table. I never transferred it from where they saw it, and if they wanted it in evidence, they could have had it. It was available for them." (Transcript of Motion for New Trial, 36, 37)

Counsel for Respondent had admitted to the jury that he was not showing them the needle which was actually used but one like it and therefore the needle which was on his table could not possibly have been introduced in evidence by anyone. The Trial Judge then, demonstrating clearly his bias in behalf of Respondent, made the statement that counsel for Petitioner could have gotten from the hospital the needle that was actually used. This of course, could not have been possible as needles used in this manner are discarded immediately after use.

Counsel for Petitioner submits that the Trial Judge's defending and even championing the position of counsel for Respondent, with respect to the one inch needle issue, clearly demonstrated, not only his indifference to his sworn and basic duty to see that the Petitioner receive a fair trial, but his actual strong bias against her in favor of Respondent. The Trial Judge in this case condoned and supported counsel for Respondent in misleading the jury during his opening statement, even though such conduct is ordinarily dealt with most severely by judges.

Further, since it is well established that improper and prejudicial statements in opening arguments warrant the granting of a new trial, the Trial Judge, by refusing to grant Petitioner's motion for a new trial based on the improper use of and reference to one inch needles, and the Supreme Court of Virginia, by refusing to review this ruling, denied Petitioner the equal protection of the laws by the Fourteenth Amendment of the United States Constitution.

Petitioner and her counsel found that although they had a strong case, they were not able to present it fairly to the jury, in the face of the Trial Judge's arbitrary and partisan actions. Petitioner was not only denied the equal protection of the laws, the same opportunity to have a fair trial that every American citizen is entitled to, she found herself in need of protection against the very Trial Judge whose sworn duty was to assure her a fair trial. This trial was a disheartening and bitter experience for Petitioner and her counsel.

Manifest injustice was done to Petitioner by the Trial Judge, and she was

denied due process of law under the following commentaries of this Court thereon:

"Procedual fairness and regularity are of the indispensable essence of liberty." Dissenting opinion of Mr. Justice Jackson in Shaughnessy v. United States ex rel. Mezei 345 U.S. 206, 224, 73 S.Ct. 625, 635, 97 L.Ed. 956 (1953).

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law always endeavored to prevent even the probability of unfairness." In re Murchison 349 U.S. 133, 136, 75 S.Ct. 623, 99 L. Ed. 942 (1955)

Due process requires "appropriate notice of the judicial action and adequate opportunity to be heard." Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932)

"It is designed to shield the litigant against arbitrary action in disregard of essential right and justice." Brown v. New Jersey 175 U.S. 172, 20 S.Ct. 77, 44 L.Ed. 119 (1899)

"A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62, 66 (1965)

CONCLUSION

For these reasons a writ of

certiorari should issue to review the judgment of October 21, 1971 of the Circuit Court for the City of Roanoke, Virginia.

Respectfully submitted,

William G. Anderson
610 Colonial-American
Bank Building
Roanoke, Virginia 24011

Counsel for Petitioner

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF ROANOKE

GLADYS C. DOSS, Plaintiff

v. ORDER #1365

LEWIS-GALE HOSPITAL, INC., Defendant

This day came again counsel for both parties and the plaintiff, by counsel, moved the Court to set aside the verdict rendered in this case on October 15, 1971, and grant a new trial on the grounds set forth in the record.

Whereupon the Court having maturely considered the evidence in the case and heard oral argument of counsel, doth overrule said motions and the plaintiff, by counsel, excepted.

ENTER: October 21, 1971

/S/ F. L. Hoback Judge.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 16th day of June, 1972.

The petition of Gladys C. Doss for a writ of error to a judgment rendered by the Circuit Court of the City of Roanoke on the 21st day of October, 1971, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Lewis-Gale Hospital, Inc., was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By: /S/ Allen L. Lucy
Deputy Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-430

GLADYS C. DOSS,
Petitioner

v.

LEWIS-GALE HOSPITAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE CITY OF ROANOKE, VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

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Of Counsel for Respondent

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No. 72-430

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v.

LEWIS-GALE HOSPITAL, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE CITY OF ROANOKE, VIRGINIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The orders of the state courts are printed in the appendix to the Petition.

JURISDICTION

(1) The Petition invokes jurisdiction under 28 U.S.C. § 1257 (3). The Petition seeks certiorari to the trial court (Circuit Court for the City of Roanoke, Virginia), and not the Virginia Supreme Court. The order of the latter court, dated June 16, 1972, recites that the petition for writ of error to the lower court judgment was maturely considered and a transcript of the record inspected, and the court being of the opinion that there was no reversible error in the judgment, the same was affirmed.

(2) No federal question was raised in the court to which certiorari is sought.

(3) The first reference to a federal question came two months after the trial in Petitioner's notice of appeal to the Virginia Supreme Court. (R. 80)

RULE INVOLVED

Rule 1:8 (now Rule 5:7) of the Rules of the Supreme Court of Virginia provided as follows:

> "In civil and criminal cases, all objections to writs of every kind, pleadings, instructions, notices, the admissibility of evidence, or other matters requiring a ruling or judgment of the trial court, shall state with reasonable certainty the ground of objection, and, unless it appears from the record to have been so stated, such objections will not be considered by this court except for good cause shown, or to enable this court to attain the ends of justice."

QUESTIONS PRESENTED

I. Was a federal question timely and properly raised in the state proceedings?

II. Did the state proceedings involve a Constitutional issue?

STATEMENT

I. *Facts.* While a patient in Respondent's hospital, Petitioner underwent amputation of her leg following development of a clot below the knee. She claimed the clot resulted from an injection of medication into her buttocks negligently administered by Respondent's nurse nine days earlier. Respondent denied negligence and contended that the clot resulted from the natural progression of Petitioner's atherosclerotic disease. Both parties produced medical testimony in support of their contentions, thereby presenting clear-cut factual issues to the jury which returned a verdict in favor of the Respondent.

II. *Proceedings.* The trial commenced on a Tuesday. The evidence was concluded before 4 p.m. on the third day, Thursday. At that time the judge advised the jury that the case would be submitted for their determination following a brief recess to allow preparation of instructions. When one of the jurors inquired whether it would be late before they would receive the case, the court replied:

> "Well, I certainly hope not too late, but we might explore the possibility of how long it would take to complete the instructions and then if you will just have a recess for a few moments, we will decide. Otherwise, you will have to return on Monday morning." (Transcript of Evidence 882)

A short time thereafter, while instructions were being considered, the jury sent word that they preferred not to remain beyond 5 p.m. that day, as they had stayed late the preceding days. The court having informed counsel early in the trial that he wished to leave the city during the next morning (Friday), he then advised counsel that he would recess the case and resume the trial the following Monday. (Stipulation of Incidents of Trial) At this time, desiring to conclude the case before the weekend, counsel for both parties proposed that instruction preparation be continued by the court and counsel, and that the jury be requested to return early the

next morning when the case could be submitted promptly for their consideration. It was further proposed that an associate judge be authorized to receive the verdict in the event the presiding judge should have to leave before the jury had concluded its deliberations.

The judge agreed to the proposal reluctantly. In asking the jury to return at 8:00 a.m. the next morning, he said: "If we can do that, then we can conclude the matter tomorrow rather than continuing over until Monday, *which I would prefer doing.*" (Emphasis supplied. Transcript of Evidence 892)

After the jury had been excused and the court and counsel had completed work on instructions, the judge inquired how much time counsel desired for presentation of closing argument. Petitioner's counsel informed the court that they would like thirty minutes, and this being agreeable to Respondent's counsel, the judge so directed. Thereafter, counsel for Petitioner advised the court that they would prefer forty minutes rather than thirty minutes, and the judge granted the request. Both parties thus agreed that each side would have a total of forty minutes in which to present closing argument. (Stipulation of Incidents of Trial)

The next morning (Friday), the jury was instructed and argument presented as scheduled, and the jury retired to deliberate its verdict. At 10:45 a.m., the presiding judge (Judge Hoback) had to leave, and the parties stipulated their approval of his departure and the receipt of the verdict by another judge. At that time, Petitioner's counsel, in agreeing to the procedure, said:

"And the plaintiff likewise stipulates to that agreement to the situation, *and we also thank Judge Hoback for the pleasure of holding this case for us.*" (Emphasis supplied. Transcript of Evidence 992)

At 11:34 a.m., less than an hour following the judge's departure, the jury announced ready and returned a verdict in favor of the Respondent.

Six days after the verdict, Petitioner formally moved the trial court to set the verdict aside. The motion was denied, and the judgment of the trial court subsequently affirmed by the Virginia Supreme Court which denied petition for writ of error.

ARGUMENT

1. *Federal Question Untimely Raised.*

This Petition seeks certiorari to the trial court on the basis of an alleged federal question never presented to it.

Prior to the jury's verdict, Petitioner's counsel were entirely satisfied with the conduct of the trial. Indeed, counsel were lavish in their praise of the court's patience and kindness, and had the jury found in Petitioner's favor, the fairness of the trial would never have been questioned. As it happened, the jury found against Petitioner: Then, and only then, did her counsel suggest any impropriety in the conduct of the trial.

Petitioner now contends that she was deprived of due process as provided by the Fourteenth Amendment, a contention she never made to the trial judge. Petitioner does not even suggest that this assertion was made during the four days of trial prior to the verdict. The best she can do is to claim that she was "prepared" to raise a federal question in her motion to set the verdict aside, but a careful reading of the transcript reveals no reference to the Fourteenth Amendment or the Constitution during the one hour and ten minutes the hearing lasted. In point of fact, *the first reference to a federal question appears as the last assignment of error in Petitioner's appeal to the Virginia Supreme Court, filed more than two months after the trial.* (R. 80)

This Court has consistently refused to exercise jurisdiction where, as in the instant matter, the so-called

federal issue was not raised at the trial court level. See *Edleman* v. *California*, 344 U.S. 357, 97 L. ed. 387, 73 S. Ct. 293 (1953); *Hulbert* v. *Chicago*, 202 U.S. 275, 50 L. ed. 1026, 26 S. Ct. 617 (1906). It is also elemental that in raising a federal question a party must observe state procedural requirements. If these are not followed, this Court will refuse jurisdiction both where the highest state court declines to pass upon the question for the procedural reason (*Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 80 L. ed. 796, 56 S. Ct. 556 (1936) and where the highest state court is silent on the question. (*Mutual Life Insurance Company* v. *McGrew*, 188 U.S. 291, 47 L. ed. 480, 23 S. Ct. 375 (1903).

The Virginia procedure was explicit in requiring statement of objections in the trial court to allow it an opportunity to correct any deficiencies. Notwithstanding this logical requirement, the complaints made in the Petition were never stated to the trial judge before the verdict.

Petitioner was advised early of the judge's anticipated absence. Contrary to insinuations in the Petition, he made it clear to all counsel that his absence was not an absolute necessity, and that his schedule would be adjusted if there should be any question as to its effect upon the trial. The judge was receptive to any objections counsel might have, but was given no cause to think any existed. Notwithstanding full opportunity to do so, Petitioner's counsel made no complaint, and showed no displeasure. If counsel had anxiety about the trial, it failed to manifest itself until several days after the verdict.

The first hint given to the judge of any dissatisfaction by Petitioner's counsel came in the hearing to set the verdict aside, and even then counsel acknowledged failure of a timely objection. Following a lengthy recital of events, this exchange occurred between the judge and Petitioner's counsel:

"THE COURT: Before you get to the law, let's get to the facts and I want the record to be replete

with full information, not only that the Court offered to continue the case to the following week —

MR. ANDERSON: Thank you, sir.

THE COURT: *but also to curtail any trip that the Court had in mind on Friday, and was urged by counsel not to do so.*

MR. ANDERSON: *That is entirely right. . . .*"

(Emphasis supplied. Transcript of Motion for New Trial 8)

II. *No Constitutional Issue*

Petitioner cannot deny that she was provided adequate time to present her case. The court was not only willing to continue the trial an extra day, but indeed indicated a preference to do so to avoid any pressures of rushing the proceedings. It is significant that the procedure followed on the last day was proposed by counsel, including Petitioner's, and not by the court.

Moreover, to accommodate counsel, the judge altered his usual trial schedule by starting earlier and adjourning later each day. The record demonstrates that Petitioner actually received the equivalent of four full days of trial.

The real basis of Petitioner's complaint is found in a strategy decision to conclude the case before the weekend. The essence of the Petition is stated at page 4: "Counsel for Petitioner knew it would be calamitous to the Petitioner for the jury to be dispersed for a three day weekend."

The Petitioner's determination in this regard was simply a matter of judgment which falls far short of raising a Constitutional issue. In fact, the jury had already been dispersed on three separate nights during the trial. It cannot be assumed that dispersion over the weekend would have any different effect, particularly in light of the court's constant admonition against dis-

cussion or consideration of the case beyond the courtroom. Nor can it be assumed that such dispersion would be more advantageous to one party than the other.

Strategy judgments occur throughout any jury proceeding. This Court does not serve to review such decisions presented in the guise of Constitutional questions.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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